UNITED STATES – CERTAIN MEASURES AFFECTING IMPORTS OF POULTRY FROM CHINA

(WT/DS392)

Answers of the United States of America to the Second Set of Questions from the Panel to the Parties

March 30, 2010

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Australia – Salmon (Article 21.5)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000
Brazil – Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
EC – Biotech	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006
EC – Hormones (Panel)	Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998

I. PROCEDURAL

Q86. China/United States: Please indicate whether you agree that the chronology of events attached in Annex A is correct. If you do not agree, please submit any corrections to the chronology in the form of an attachment to your answers.

1. Per the Panel's request, the United States has attached corrections to the chronology in the form of the attachment. In addition, the United States would like to take the opportunity to explain a few of its corrections.

2. With regard to event 10, it is important to note that FSIS's determination that China was equivalent for slaughtered poultry was only a preliminary determination subject to modification pending the outcome of the rule making process. FSIS does not reach a final determination until after it has received public comments and taken them into consideration, and it did not reach a final determination on China's poultry slaughter inspection system.[1] Accordingly, the first paragraph of event 10 should read as follows: "FSIS made a preliminary determination~~ed~~ that China's system for slaughtering domestic poultry was equivalent to US standards.

3. With regard to event 11, it is important to note that China was not the only country to receive a letter around this time. In fact, during December 2007, FSIS sent letters to all 34 countries whose poultry inspection systems (either processing or slaughter) were equivalent for poultry or meat products to inform them of the need to re-certify the establishments eligible for export. China received this letter because FSIS found its poultry processing inspection system equivalent in April 2006. Accordingly, the description of the event should be modified as follows: "US sent letter to all countries equivalent for at least one product requesting their ~~country's~~ annual certification of establishments eligible to export meat or poultry products to the US. ~~This letter was addressed only to China~~."

4. In this context, the United States would also note that FSIS's failure to accept China's certification of Chinese processing establishments as eligible to export to the United States pursuant to China's March 2008 reply was not due to Section 733 of the Fiscal Year 2008 Omnibus Appropriations Act. Rather, FSIS could not accept China's certifications due to the length of time that had passed since FSIS last audited China's processed poultry inspection systems.[2] In other words, even without the enactment of Section 733, China's March 2008 letter could not have allowed China to export processed poultry to the United States because China

[1] *See* U.S. First Written Submission, para. 48.

[2] In general, FSIS conducts annual audits of equivalent countries to ensure that they retain eligibility to export to the United States, thereby rendering equivalence determination reviews unnecessary. However, because China did not attempt to certify any poultry processing establishments as eligible to export until March 2008, nearly two years after its processed poultry inspection system was found equivalent in April 2006, it allowed its eligibility to lapse. As a result, FSIS was required to conduct an equivalence determination review to evaluate China's continued equivalence before China would again be eligible to export processed poultry products to the United States.

allowed its eligibility to temporarily lapse by not attempting to certify any establishments at an earlier date.

II. ARTICLE I OF THE GATT 1994

Q87. United States: In paragraph 56 of its second oral statement, the United States argues that China's poultry may not be "like" poultry from other Members because of its safety and that China's hypothetical approach to the like products analysis has no validity in the context of evaluating the operation of an equivalency-based food-safety regime. However, the United States has also noted that Article 4 of the SPS Agreement is the relevant provision of the covered agreements governing equivalency-based regimes. Therefore is the United States arguing that any violation of Article I is excused because Section 727 is an SPS measure?

5. No. The United States is not arguing that the SPS Agreement excuses any alleged violation of Article I. (This question is an apparent reference to Article 2.4. of the SPS Agreement, which the United States has not relied upon in this dispute.)

6. Rather, the United States submits that China has failed to meet its burden of showing that poultry from China is a "like product" to poultry from other Members, because China has not shown that poultry from China is as safe as poultry from other Members. There is no doubt that consumers would consider poultry that is safe as "unlike" poultry that could make them ill if they eat it. Indeed, a key purpose of the PPIA – which China does not challenge – is to establish whether safety measures of potential exporting countries achieve the same level of protection as the U.S. system, and thus whether poultry from China is as safe as poultry produced in the United States. China's argument is premised on the assumption that the U.S. equivalence process, upon completion, will make that finding. China, however, has not made any showing to support this premise.

III. ARTICLE XX(b)

Q88. United States: In paragraph 87 of its second written submission, the United States argues that China's SPS claims "add nothing to the arguments already developed by the parties regarding the application of Article XX(b) of the GATT 1994". If Section 727 is an SPS measure, what would be the legal basis for the Panel to examine the GATT claims first and exercise judicial economy on the SPS claims? Please address the prior reasoning of the Appellate Body cited by China in paragraph 50 of its second oral statement, in your answer.

7. The legal basis for the Panel to consider the GATT 1994 claims first is that the Panel has the discretion with regard to how it structures its analysis. This is not a situation with respect to

which the WTO Agreement requires, or the Appellate Body has found, that there must be a particular order of analysis.

8. The United States certainly does not believe that there is a general rule requiring that GATT 1994 claims be analyzed prior to SPS claims. Rather, in each dispute, the most appropriate order of analysis is governed by the specific facts and circumstances, including the procedural history of how the arguments were presented.

9. In this dispute, the United States submits that, for the following reasons, the appropriate order of analysis starts with China's GATT 1994 Article XI claim:

- China's consultations request affirmatively stated that the U.S. measures were not SPS measures, and it only sought consultations under the SPS Agreement if it were subsequently determined that the U.S. measures fell within the SPS Agreement.

- China's first written submission alleged that the U.S. measure was "budgetary," and made no allegation that the U.S. measure was an SPS measure. Instead, China's first written submission focused on the issues under GATT 1994 Articles I and XI.

- As a consequence of China's legal strategy not to make an affirmative SPS case in its China's first submission, the U.S. first written submission only addressed issues under the GATT 1994.

- Although China now advances claims under several SPS Agreement provisions, China has not made a claim under the SPS Agreement article (Article 4) that is specifically addressed to measures involving determinations of equivalence.

- And perhaps most importantly, upon examination, China's SPS arguments are primarily a rephrasing of its fundamental argument under GATT 1994 Article XX – namely, that Section 727 was not "necessary" because FSIS procedures were sufficient to meet the U.S. goal of ensuring the safety of poultry imports from China. To be sure, the SPS Agreement contains obligations in addition to those set out in the GATT 1994, but in the particular circumstances of this dispute, the substantive issues that China has presented under the SPS Agreement are essentially the same as the substantive issues that China first presented in the context of GATT 1994 Article XX.

10. The reasoning that China cites in paragraph 50 of its second oral statement (which is from the panel report in *EC – Hormones*) is not pertinent to the question of how the Panel should structure its report in the present dispute. In *EC – Hormones*, the responding party argued that the SPS Agreement did not contain new "substantive" obligations as compared to the GATT

1994, and therefore that the Panel *was required* to first examine the complaining party's GATT 1994 claims. The United States disagreed then (and now) with the responding party's reasoning that GATT 1994 claims must be examined first in an SPS dispute.[3] The question, here, however, is different: as noted, the question is how the Panel should structure its analysis in light of the particular facts and circumstances of this dispute.

Q89. United States/China: Can a JES direct an executive branch agency to take particular actions?

11. The United States agrees with China that the legal impact of an appropriations funding measure is limited to its explicit terms.[4] As such, Section 727's legal impact was narrowly limited to prohibiting the use of funds to "establish" or "implement" equivalence rules for Chinese poultry. Accordingly, FSIS could continue to conduct activities related to China's equivalence application during Fiscal Year 2009 provided that equivalence rules were not actually established or implemented.

12. As China notes, U.S. domestic jurisprudence indicates that Joint Explanatory Statements do not have the force of law like the underlying legislative text that they accompany.[5] However, Congress often accompanies legislation with these statements to further clarify the intent of a given provision or to inform an executive branch agency of the steps it expects will be taken to effectuate the text's underlying objective.

13. In this instance, the JES accompanying Section 727 indicated Congress' expectation that FSIS take certain steps during 2009 to ensure that Section 727's policy objective would be achieved. In particular, the JES directed FSIS to analyze China's new food safety law and create an action plan that would guarantee the safety of poultry products from China, among other steps related to China's equivalence application. And FSIS did indeed follow as many of the steps as possible in light of China's failure to respond to FSIS's inquiry about China's new food safety law.

Q90. United States: In paragraph 41 of its second oral statement, the United States contends that the appropriate Members to compare China to are those that have received equivalency or have applied for it. However, in its subsequent arguments, the United States only references Members who FSIS has deemed equivalent. Are there any other WTO Members who have applied for equivalence since 2004 when China first applied?

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[3] *EC – Hormones* (Panel), para. 8.33.

[4] *See* China Second Written Submission, para. 32.

[5] *See* Exhibit CN-58.

14. Since China applied for poultry equivalence on April 20, 2004, 15 other countries have also applied. These countries are the following: Argentina (June 24, 2004); Barbados (January 11, 2008); Belgium (June 20, 2006); Bulgaria (June 24, 2004); Egypt (July 19, 2005); Ecuador (January 6, 2008); Korea (April 25, 2004); Latvia (November 12, 2004); Lithuania (September 10, 2004); Pakistan (June 8, 2006); Panama (July 20, 2007); Poland (October 14, 2004); Singapore (March 14, 2006); Slovenia (December 2, 2005); and Sweden (June 6, 2006).

15. Most of these countries have not progressed very far in the equivalence process. To date, only Korea and Bulgaria have successfully passed the document review stage and only Korea has had any audits conducted on its poultry processing and slaughter establishments. Thus, none of these countries have been or are currently subject to an imminent equivalence determination and congressional action on their respective equivalence applications would not have been expected at this stage in the process even if there were similar concerns with their applications as there was with China's application.

16. Given the different stages these countries were at in the equivalence process compared to China, none of these countries can be said to have been similarly situated as China at the time Section 727 was enacted. Accordingly, it is not appropriate to compare their situations with China's for purposes of examining the issue under the Article XX chapeau and the United States has not done so in its submissions or statements before the Panel.

Q91. United States/China: During its responses to the questions in the second substantive meeting, the United States argued that Congress could have enacted measures which would have been more trade restrictive than Section 727. Is this enough to prove that Section 727 was the least trade-restrictive measure that Congress could have enacted to achieve its policy objective?

17. As an initial matter, the United States would note that Article XX(b) does not contain any "least trade restrictive" requirement or condition. The ordinary meaning of the term "necessary" in context and in light of the object and purpose of the GATT 1994 is not "least trade restrictive." Accordingly, in order to demonstrate that Section 727 is necessary to protect life and health, the United States does not have the burden to demonstrate that Section 727 was the least trade-restrictive measure that Congress could possibly have enacted to achieve its policy objective. Rather, the United States understands the relevant Appellate Body and panel reports as simply indicating that a measure is more likely to be found "necessary" in accordance with Article XX(b) if the measure is of limited trade restrictiveness.[6] By pointing out other measures that Congress could have enacted that would have been more trade restrictive, the United States was providing further explanation of why Section 727 should be considered of limited trade restrictiveness should the Panel choose to give weight to the "weighing and balancing" element used in past reports.

[6] *See, e.g.*, *Brazil – Tyres* (AB), paras. 178-183.

IV. IS SECTION 727 AN SPS MEASURE?

Q93. United States: In its first written submission, the United States argued that Section 727 was not an SPS measure. Yet in its second written submission, the United States argues that Section 727 was taken in the context of the ongoing equivalence determination. Can the United States please confirm to the Panel what its view is on whether Section 727 is an SPS measure? Please explain why?

18. As China stated at the second substantive meeting, China's decision on how to present its SPS claims was governed by "tactical" considerations. As a result of China's tactics, China's first written submission denied that the U.S. measure was adopted for reasons of safety, and instead characterized the U.S. measure as "budgetary." In furtherance of its "tactical" considerations, China then reversed course and alleged at the first substantive meeting that the U.S. measure was an SPS measure.

19. In contrast, the U.S. position has remained constant throughout this dispute. Namely, the U.S. position is that the U.S. measure was adopted in the context of an ongoing equivalence procedure to ensure the safety of poultry from China , and that China – as the complaining party – has the burden of establishing each element of any SPS claim, including whether the measure meets each element of the definition in the SPS Agreement.[7] That burden is particularly relevant where a complaining party, as here, has flatly asserted that a measure does not fit within the definition and then chooses to adopt a contradictory position. China bears the burden of explaining precisely what has changed and how that change results in a measure now meeting each element of the definition. Moreover, the United States has explained that simply because a measure falls within the Annex A definition of an "SPS measure" does not dictate how any particular SPS provision applies to that measure.

Q95: United States: In its answer to the Question 43, the United States argues that the Panel should follow the reasoning of the panel in EC - Approval and Marketing of Biotech Products and examine not only the purpose and form, but also the nature of the measure in determining whether Section 727 is an SPS measure. Please explain how the "nature" element of the analysis would lead to the conclusion that Section 727 is not an SPS measure?

20. The position of the United States is that the nature of the measure – in this case, a procedural requirement in the course of an ongoing equivalence procedure – must be considered in deciding how any particular SPS provision applies to the measure. With regard to whether the U.S. measure meets the Annex A definition, the United States (as noted in response to Question

[7] U.S. First Written Submission, Part VII. The United States notes that the United States in its first written submission presented no argument that Section 727 was not an SPS measure.

93) has simply stated that China as the complaining party has the burden of meeting each element of any SPS claim.

Q97. China/United States: Are measures adopted in the context of equivalence determinations SPS measures for the purposes of Annex A of the SPS Agreement?

21. Measures adopted in the context of an equivalence determination – just as measures adopted in the context of other procedures mentioned under the SPS Agreement – could meet the Annex A definition. In each case, the measure at issue must be considered in light of the definition set out in Annex A. However, the fact that a measure were adopted in the context of an equivalence determination would not itself determine which obligations under the SPS Agreement apply to that measure or how. For example, a requirement that information submitted in the context of an equivalence determination be provided in the language of the importing Member would not seem to be the type of measure that required scientific evidence or a risk assessment to justify it. There are numerous other, similar procedural requirements that could be adopted in the context of an equivalence determination that likewise would appear not to trigger obligations under various other provisions of the SPS Agreement, such as requirements as to which government entity to submit information, the form or number of copies of evidence, or means of delivery.

Q98. United States: In paragraph 85 of its second written submission the United States argues that Section 727 was enacted for the purpose of ensuring that the FSIS process fully took account of enforcement problems in China's food safety system. Please explain how prohibiting FSIS from conducting an equivalency investigation furthered that goal?

22. Section 727 did not prohibit FSIS from conducting an equivalence investigation. Rather, Section 727's effect was simply to prohibit FSIS from using appropriated funds to "establish" or "implement" equivalence rules for Chinese poultry for a temporary six and a half month period during fiscal year 2009. At the same time, Section 727 explicitly permitted FSIS to continue work related to China's equivalence application, including actions under the PPIA. These actions, in and of themselves, were actions that were part of an ongoing investigation into China's food safety system.

23. Further, it is important to note that the enactment of Section 727 has improved FSIS's equivalence investigation of China's poultry inspection systems. Given that Section 727 made clear the particular concerns that Congress had with China's food safety system, FSIS's investigations, both during and after Section 727's period of applicability, will place a greater emphasis on these issues. In this way, Section 727 will better ensure that life and health is protected from the risk posed by Chinese poultry.

V. RELATIONSHIP BETWEEN ARTICLE 4 AND OTHER PROVISIONS OF THE SPS AGREEMENT

Q99. China/United States: What is the relationship between Article 4 and Articles 2.2 and 2.3 of the SPS Agreement? Are Articles 2.2 and 2.3 on the one hand, and Article 4 on the other hand mutually exclusive?

24. It is not the position of the United States that Article 4 and other SPS Articles are necessarily "mutually exclusive." Rather, the United States has made two main points, in the context of this dispute, about Article 4 and other SPS articles.

25. First, the United States has explained that Article 4 is the only article in the SPS Agreement specifically addressed to equivalence-based measures. Despite this, China has brought no claims under Article 4.

26. Second, to determine whether other SPS articles apply to a measure adopted in the context of an equivalence proceeding, one must carefully evaluate the specific measure, and the specific arguments regarding the alleged breach. Accordingly, it is difficult to generalize about the relationship between Article 4 and other provisions of the SPS Agreement.

27. That said, it would appear that Articles 2.2. and 2.3 could apply to a measure (such as the PPIA) that establish an equivalence-based safety regime. In this dispute, however, China does not argue that the PPIA itself is inconsistent with any provision of the SPS Agreement. At the same time, as noted above, it would be difficult to see why there would need to be scientific evidence for, or a basis in scientific principles for, any number of measures adopted in the context of an equivalence proceeding, such as the language, form, means of delivery or number of copies of information submitted. And some measures will necessarily flow from the particular circumstances of that equivalence proceeding, such as a request for clarification or follow-up with respect to particular information submitted by the other Member.

Q100. China/United States: What is the relationship between Article 4 and Articles 5.1, 5.5 and 5.6 of the SPS Agreement? Are Articles 5.1, 5.5 and 5.6 on the one hand, and Article 4 on the other hand mutually exclusive?

28. The United States respectfully refers the Panel to the U.S. answer to Question 99.

29. As is the case for Articles 2.2. and 2.3, it may be possible that Article 5.1 could apply to a measure that established an equivalence-based safety regime. In this dispute, however, China does not argue that the PPIA itself is inconsistent with any provision of the SPS Agreement. And similar to the situation with respect to Article 2.2 and 2.3, it would be difficult to see how Article 5.1 necessarily applies to every measure adopted in the context of an equivalence proceeding.

30. At the same time, it would not appear that Article 5.5 or 5.6 would apply to an equivalence regime. By definition, that regime is aimed at determining if another Member's measures achieve the importing Member's appropriate level of protection. Therefore, by definition, there is only one appropriate level of protection at issue. Since Article 5.5 requires distinctions in the appropriate level of protection, Article 5.5 would not appear to apply. Similarly, Article 5.6 would not appear to apply since Article 5.6 is about the measures that a Member itself adopts to achieve its appropriate level of protection, while an equivalence regime is about the measures another Member has adopted. An equivalence proceeding, by definition, is aimed at determining if the exporting Member's measures meet the importing Member's appropriate level of protection.

31. These examples illustrate the need to be very careful and cautious in approaching the relationship between these provisions of the SPS Agreement. This relationship has not previously been the subject of any dispute settlement proceeding. Where, as here, a complaining party has chosen not to make a claim under the provision of the SPS Agreement that would appear most directly applicable – Article 4 – there is even more reason to avoid arguments to expand the scope of other provisions of the SPS Agreement. Those arguments risk diminishing or supplanting the specific obligations and conditions agreed to by Members with respect to issues of equivalence.

Q101. United States: In paragraph 89 of its second written submission, the United States argues that equivalence systems, as described by Article 4, are premised on the differential treatment of products from different WTO Members. Does this mean that Article 4 authorizes Members to design equivalency systems which result in arbitrary or unjustifiable discrimination between Members?

32. No. While "differential treatment" is inherent in an equivalence system, "arbitrary or unjustifiable discrimination" is not.[8] As the United States has explained, however, Section 727 does not amount to arbitrary or unjustifiable discrimination between Members. Rather, Section 727 was a reasoned response to ongoing food safety crises in China, and no other Member was similarly situated.

(a) If not, why wouldn't Article 2.3 apply to equivalency regimes?

33. As noted in response to Question 99, Article 2.3 hypothetically could apply to an equivalence regime.

[8] It is possible to postulate examples where there appears to be arbitrary or unjustifiable discrimination. One such example could be where a Member deems equivalent the measures of any Member with a bound tariff rate for the product that is an even numbered rate.

Q102. United States: In paragraph 105 of its second written submission, the United States argues that equivalence-based regimes, by their very nature, must discriminate between different Members. Does this by itself means that equivalence-based regimes are not subject to Article 2.3 of the SPS Agreement?

34. As explained more fully in response to Question 99, the United States does not argue that Article 4 and Articles 2.2 and 2.3 are mutually exclusive.

Q103. United States: Please respond to China's argument in paragraph 21 of its second oral statement with respect to the legal implications of the US arguments about equivalency regimes on the rest of the SPS Agreement.

35. China's argument in paragraph 21 is meritless for a number of reasons.

36. The first flaw in China's argument is its starting point: namely, the assertion that "Section 727 can not be considered part of the FSIS equivalence procedures." China's phrasing was carefully chosen to miss the main point regarding Section 727 – namely, that Section 727 was part of the United States equivalence procedures, which includes the procedure of congressional oversight. A legal analysis under the WTO Agreement provisions does not turn on whether one considers Section 727 as part of "FSIS equivalence procedures" – as opposed to part of U.S. equivalence procedures as a whole.

37. China's failed attempt to focus only on "FSIS procedures" is important, because this was China's basis for attempting to distinguish the panel's reasoning in *EC – Biotech.* In *EC – Biotech,* the panel found that a *de facto* moratorium on the operation of an approval system was not subject to the Article 5.1 requirement for a risk assessment, because the measure only affected the operation of the approval procedure, and was not a substantive measure that served to meet the Member's appropriate level of protection. Indeed, similar to the measure at issue in the current dispute, the measure in *EC – Biotech* did not alter the procedures of the EC regulatory agency that was responsible for biotech approvals. Instead, it was a measure that affected the operation of those procedures, without amending them. In this sense, *EC – Biotech* is indistinguishable from the current dispute.

38. The second flaw in China's argument is that it mischaracterizes the U.S. argument. The United States is not arguing, as China asserts, that equivalence-based regimes are necessarily exempt from all other SPS articles. At the same time, as explained in response to Questions 99 and 100, it is difficult to see how a measure adopted in the context of an equivalence proceeding would necessarily be subject to each of these provisions.

39. As for every claim, the specific measure at issue, and the specific SPS obligation subject to a claim, must be carefully considered. And in this case, for example, China cannot explain how it makes sense to find that a procedure adopted in the course of determining equivalence

must itself be supported by a risk assessment. (As noted above, it may well be that the equivalence regime as a whole is subject to Article 5.1, in that the requirement to show equivalence for measures regulating a product is based on a risk assessment showing that measures are needed to protect against a risk from the product,[9] but China has made no claims regarding the consistency of the PPIA with obligations under the WTO Agreement.)

40. The third flaw in China's argument involves its argument regarding Article 8's "undue delay" obligation: in particular, China's argument that Article 8 *must* apply to steps taken in equivalence procedures is an unabashed appeal to add an obligation to the SPS Agreement, on the basis that – in China's view – the SPS Agreement would otherwise contain a gap and the Panel must fill it. But this type of reasoning is expressly prohibited by the DSU – the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[10] As the United States explained in its second written submission,[11] Article 8 is explicitly limited in its coverage to control, inspection, and approval procedures – it does not cover every procedure (such as equivalence procedures) mentioned in the SPS Agreement. To find otherwise would be plain legal error.

41. Furthermore, the fact that Members, in adopting the SPS Agreement, chose not to adopt a procedural annex for equivalence proceedings comparable to Annex C for control, inspection, and approval procedures does not mean (as China alleges) that the SPS Agreement contains a loophole. The simple fact is that for one reason or another, Members did not agree to detailed procedural disciplines for equivalence proceedings. Accordingly it is not permitted to impose such disciplines through dispute settlement. In sum, the third flaw in China's argument in paragraph 21 of its second oral statement is that China is asking the Panel to take the impermissible step of rewriting the SPS Agreement, on the basis of a purported gap that does not in fact exist.

Q104. China/ United States: Could the parties please comment on the relevance and legal value of the "Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures" (G/SPS/19/Rev.2) to the Panel's understanding of equivalence according to Article 4 of the SPS Agreement?

42. China cited the Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (Article 4 Decision) in its second oral

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[9] For example, where an importing Member has a pest present in its territory and measures in place to protect against the risk of that pest, there may be an initial question as to whether it is appropriate to require an exporting Member to show that it has equivalent measures in place with respect to that risk if the pest is not present in the territory of that exporting Member.

[10] *DSU, Art. 3.2.*

[11] U.S. Second Written Submission, paras. 119-125.

statement solely to support China's point that equivalence procedures are not to serve as an excuse for trade impediments.[12] This general statement of purpose, however, adds nothing to the preamble of the SPS Agreement itself, which states a desire to "minimize the negative effects [of SPS Measures] on trade." And these general statements regarding negative trade effects must simultaneously be considered with the reaffirmation – in both the Article 4 Decision and the SPS Agreement – "of the right of Members to establish [SPS measures] necessary to ensure the protection of human, animal and plant life and health."[13] In sum, the purpose for which China cites the Article 4 Decision does not add any useful element to the analysis under the SPS Agreement.

43. In addition, the Article 4 Decision cannot be an authoritative interpretation of the SPS Agreement (since that authority is reserved to the Ministerial Conference or General Council). However, the United States notes that the Article 4 Decision does support the fact that Annex C of the SPS Agreement does not cover equivalence procedures. In particular, paragraph 3 of the Article 4 Decision addresses the timing of equivalence determinations. It states that the importing Member shall respond in a "timely manner" to an equivalence request from an exporting Member, normally within six months. The fact that the SPS Committee decided to address timing issues of equivalence determinations – without any reference to the "undue delay" obligation in Annex C – supports the point that Members never intended for Annex C to apply to equivalence determinations.

Q105. China/United States: Are the Codex Alimentarius standards on equivalence relevant for the interpretation of Article 4?

44. As for the Article 4 Decision, China cites the Codex standard in its second oral statement solely to support China's point that equivalence procedures are not to serve as an excuse for trade impediments.[14] The language cited by China, however, is from CAC/GL 34-1999 (Ex. CH-73), which is a standard concerning bilateral and multilateral equivalence agreements – the standard does not (as China states) apply generally to equivalence procedures. Thus, CAC/GL 34-1999 is not addressed to the issues in this dispute. The United States does note that the second standard cited by China (CAC/GL 47-2003) includes broad language about the importance of food safety. In particular, the standard states that "In the design and operation of food import control systems, precedence should be given to protecting the health of consumers and ensuring fair practices in food trade over economic and other trade considerations."[15] In any event, the purpose for which China cites these Codex standards does not add any useful element to the analysis under the SPS Agreement.

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[12] China Second Oral Statement, para. 27.

[13] Article 4 Decision, third preambular clause; SPS Agreement, first preambular clause.

[14] China Second Oral Statement, para. 27; Exhibit CN-73 (CAC/GL 34-1999); Exhibit CN-75 (CAC/GL 47/2003).

[15] Exhibit CN-75, para. 3.12.

VI. RELATIONSHIP BETWEEN SECTION 727 AND THE EQUIVALENCE REGIME

Q106. United States: Is the equivalence-based regime adopted by the United States the measure it chose to achieve its ALOP? If yes, would it have to comply with Article 2.2 and Article 5?

45. No. The measures adopted by the United States to achieve its ALOP are those that govern U.S. processors and slaughter facilities. China is free to apply those measures, but it has chosen to adopt different measures. Under the equivalence regime, the question is whether China's measures, though different from the U.S. measures, nonetheless achieve the U.S. ALOP. The United States did not choose China's measures and has no control over them. This is why Article 4 exists in the SPS Agreement – to address the situation in which a Member that employs measures other than those adopted by another Member to achieve that other Member's ALOP nevertheless seeks to have that other Member accept its measures as achieving that other Member's ALOP. As the United States noted above in response to Question 100, as a theoretical matter, an equivalence system may be subject to Articles 2.2 and 5.1. In this dispute, however, China has not challenged the PPIA; rather, it has only challenged one specific procedural measure adopted by Congress as part of its oversight responsibilities.

Q107. United States: In paragraph 99 of its second written submission, the United States describes Section 727 as "a procedural requirement adopted in the course of an ongoing equivalency review." What is the requirement that Section 727 imposes?

46. The requirement imposed by Section 727 was that FSIS could not use appropriated funds to establish or implement equivalence rules related to Chinese poultry during fiscal year 2009. The imposition of this requirement was an act of congressional oversight taken in the context of an ongoing equivalence proceeding. This requirement ensured that FSIS did not move forward with the equivalence rules without fully considering China's food safety enforcement problems, massive food safety scandals, and new food safety law.

Q108. United States: Assuming that Section 727 is a procedural requirement, does it help check and ensure the fulfilment of the PPIA?

47. Yes. By ensuring that FSIS would fully consider China's food safety challenges before establishing or implementing equivalence rules for Chinese poultry, Section 727 helped ensure that FSIS would meet the PPIA's objective of ensuring that imported food is safe.

Q109. China/United States: Is Section 727 part of the equivalence regime or a separate and distinct measure?

48. Section 727 is part of the equivalence regime itself. Although Section 727 and similar acts of congressional oversight are not explicitly listed in the PPIA or its related regulations, Congress maintains oversight over actions taken by the executive branch as it executes the laws passed by Congress, including the PPIA. Thus, as an act of congressional oversight taken in the context of an ongoing equivalence proceeding, Section 727 is a part of the U.S. equivalence regime.

Q110. United States: How does Section 727 contribute to poultry products from China being safe?

49. Section 727 directly contributed to its policy objective of protecting life and health by ensuring that equivalence rules for Chinese poultry would not be established or implemented before FSIS fully considered China's problems with food safety enforcement, its numerous food safety scandals, and its new food safety law. Section 727 achieved this objective in numerous ways.

50. First and most directly, Section 727 ensured that no Chinese poultry would be imported during 2009 under equivalence rules that Congress was concerned did not fully account for China's unique food safety challenges. There were strong concerns in Congress that FSIS's initial determinations did not fully address the risk posed by Chinese poultry, in large part because FSIS had never before been asked to make an equivalence determination for a country with such severe food safety problems. Accordingly, by preventing rules from being established or implemented that would allow Chinese poultry to be exported to the United States during 2009, life and health was protected.

51. Second, Section 727 contributed to its objective by ensuring that any poultry exported to the United States under an equivalence rule was subject to a determination that focused more directly on China's unique problems. By passing Section 727, Congress made clear that it had strong concerns about FSIS's equivalence determination and brought to FSIS's attention particular issues of concerns, such as China's food safety crises and problems of food safety enforcement. With these concerns in mind, any subsequent analysis by FSIS will certainly place a greater emphasis on addressing these issues.

52. Beyond this, Section 727 also contributed to its objective as explained in the JES that directed FSIS to take specific actions during 2009 to ensure that life and health was protected. These steps included a review of China's new food safety law and the creation of an action plan outlining how FSIS would proceed with its equivalence determination for China.

53. Finally, Section 727 directly contributed to its objective by giving FSIS time to make numerous changes to the equivalence process to ensure that the process would more effectively protect life and health. For example, FSIS expanded the scope of its equivalence review to consider information that does not directly involve the products it regulates but have a bearing on the integrity of the country's food safety system. At the same time, FSIS increased the extent to

which it communicates with trading partners and obtains information from other sources such as the WHO to look at a country's potential systemic problems. FSIS developed its Self-Assessment Tool and Self-Reporting Tools. Overall, these series of changes will make the equivalence process more effective at identifying specific concerns, therefore making it easier to address these concerns and protect life and health.

Q111. United States: In response to question 78, the United States noted that "Section 727's enactment was not intended to block these potential shipments of poultry from entering the United States, but to ensure that any shipments were safe." Could the United States please explain to the Panel how the funding restriction contributes to ensuring that shipments of poultry from China are safe?

54. The United States refers the Panel to its response to Question 110 for a full description of how Section 727 directly contributed to its objective of protecting life and health.

(a) Could the same result have been achieved through the operation of the standard FSIS procedures?

55. Congress believed that additional assurances were needed. FSIS in practice had never before been asked to make an equivalence determination for a country with China's unique food safety problems, food safety crises, and new food safety law. Accordingly, Congress was concerned that FSIS did not place enough emphasis on these issues and enacted Section 727 to ensure that FSIS would focus on these issues before moving forward with its equivalence rules.

(b) Did Congress have any other options, pursuant to its oversight authority, other than the implementation of a funding restriction such as Section 727?

56. There are many other actions that Congress could have taken to direct FSIS to protect life and health from the risk posed by Chinese poultry.

57. For example, Congress could have amended the PPIA itself, making the change permanent instead of temporary. Likewise, Congress could have passed a resolution of disapproval pursuant to its authority to review executive branch rule makings under the Congressional Review Act.[16] A resolution of disapproval would have sent the rule making back to the beginning of the process instead of allowing FSIS to build on the work it had already completed as it continued to assess China's equivalence in light of the concerns raised about China's problems of food safety enforcement. Finally, Congress could also have passed a funding restriction that did not allow FSIS to engage in work related to China's equivalence application during the life of the measure.

[16] *See* Exhibit US-2, p.1, for a brief discussion of the Congressional Review Act.

58. Instead, Congress enacted a measure that was temporary and targeted to the problems posed by China's equivalence application. Accordingly, Section 727's limited trade restrictiveness favors a determination that Section 727 was necessary under the weighing and balancing element employed in a number of previous disputes related to Article XX(b).

(i) Could any of these options have been less trade restrictive?

59. As noted above, Section 727 is limited in its impact on trade. It is not clear that other less trade restrictive options would have ensured food safety.

Q112. United States: In paragraph 88 of its first written submission, the United States contends that Section 727 as an appropriations measure "does not amend or modify the permanent law administered by an executive agency". However, throughout its second written submission the United States contends that Section 727 was not an autonomous measure, but was taken in the context of an equivalency determination. Can the United States please clarify whether it contends that Section 727 is a component of its equivalency-based regime, which is embodied in the PPIA?

60. These two statements by the United States are not inconsistent with each other. Section 727 does not amend or modify the permanent law administered by FSIS. Rather, Section 727 is an act of congressional oversight over FSIS's implementation of the PPIA to ensure that FSIS administers the law in a manner consistent with its congressional mandate. In this sense, as the United States noted in response to Question 109, Section 727 is a part of the equivalence regime itself.

VII. SPS CLAIMS

A. ARTICLE 2.2

Q114. United States: Is there any scientific basis underlying Section 727?

61. Yes. Section 727 is intended to address food safety enforcement problems in China, and it follows scientifically that given the problems identified with respect to China that there was a need to ensure that exports from China would be safe.

Q115. United States/China: Should the evidence provided by both parties related to news articles be considered scientific evidence for the purposes of the SPS Agreement?

62. The term "scientific evidence" is not defined in the SPS Agreement and must be interpreted in context. While, for example, a newspaper report on the possible health effects of a certain additive might not be considered "scientific evidence," when the question is one

involving the operation of government institutions, news articles may be the only available source of information.

B. ARTICLE 5.5

Q118. United States/China: Does the US ALOP for poultry as expressed in the PPIA equate to a "zero risk" tolerance?

63. No. As the United States has noted, its ALOP for poultry as expressed in the PPIA is that the poultry must, in general, be safe.[17] While the US ALOP is intended to mitigate the risk associated with imported poultry to the maximum extent possible, it is not "zero risk" for poultry products. Through the operation of its equivalence regime, the United States attempts to minimize this risk to the maximum extent possible. And in this instance, due to the heightened risk posed by Chinese poultry, Section 727 was necessary to ensure that the US level of sanitary protection would be met.

Q119. United States/China: Is there such a thing as a "less than zero risk" ALOP?

64. No.

Q120. United States: Does the United States agree with China that imports of poultry from China is a "different situation" from imports of poultry from other WTO Members, within the meaning of Article 5.5 of the SPS Agreement? If not, why not?

65. No. The United States does not agree – China is incorrect to refer to an ALOP for a "product" from a particular "Member." There is only one ALOP and it is for a particular risk – it is "protection" from a "risk" (which is why it is also referred to as the acceptable level of risk). See e.g., SPS Article 5.3 and 5.5 (which refer to protection "from" or "against" risks). See also Article 9.1 which makes it clear that the ALOP is "in the market" of a Member, not with respect to particular products of particular Members. Accordingly there is no distinctions in the U.S. ALOP for poultry from China as opposed to the United States or other Members.

Q121. United States: Does the United States agree with China that imports of poultry from China is a "different situation" from imports of other food products from China, within the meaning of Article 5.5 of the SPS Agreement? If not, why not?

66. China has not established that imports of poultry from China are a "different situation" from imports of other food from China. As noted in the response to Question 120, an ALOP is

[17] *See* U.S. Second Written Submission, para. 57.

addressed to specific types of risks. China has not established that the types of risks addressed by the PPIA are the same as the risks associated with other types of food products.

67. But more importantly, even if China could show that poultry and other foods could be considered "different situations" under Article 5.5, China has not come close to establishing any of the elements of an Article 5.5 claim. First, China has not established that poultry has a different ALOP than other food products. Second, China has not established that any distinction in ALOPs is arbitrary or unjustifiable. To the contrary, although the United States strongly disputes that products regulated by FSIS and FDA are subject to different ALOPs, it would not be inherently arbitrary or unjustifiable for different types of regulatory regimes to use different ALOPs. Finally, China has not even put forth an argument showing that the alleged distinction in ALOPs results in international trade discrimination.

Q125. China/United States: Prior panels and the Appellate Body have concluded that a finding of inconsistency with Article 5.5 would necessarily imply an inconsistency with Article 2.3. Do the parties agree with this interpretation?

(b) Both parties - if yes, please explain whether the text of Article 5.5 prohibits a type of discrimination not prohibited by Article 2.3.

68. This dispute does not present this issue because there is no distinction in ALOP's in different situations at issue, nor is there any discrimination against poultry products from China. As a general matter, a valid Article 5.5 claim with respect to discrimination must show that some distinction in ALOP's in different situations results in discrimination between products of different Members. The United States notes differences in the texts that at least raise some question as to whether they will necessarily always end up in the same place. For example, any "discrimination" found for purposes of Article 5.5 would also need to be "arbitrary and unjustifiable" in order to be inconsistent with Article 2.3.

C. ARTICLE 2.3

Q127. United States: China has argued that, pursuant to the Appellate Body ruling in US - Shrimp, identical or similar conditions prevail in any Member that seeks to export poultry to the United States (see China's response to Question 44). Does the United States agree that this is the appropriate standard for determining in which Members, "identical or similar conditions prevail" for the purpose of Article 2.3 of the SPS Agreement?

69. China is misinterpreting the Appellate Body's conclusion in *US – Shrimp*. While the Appellate Body compared the treatment between countries who desired to export to the United States to determine whether the U.S. action in that dispute was discriminatory, the Appellate Body does not state that the same conditions prevailed in these countries simply because of a shared interest in exporting. Rather, the Appellate Body found that the U.S. policy being

examined in *US – Shrimp* ran afoul of the Article XX chapeau because it employed a one-size-fits-all approach to protecting sea turtles without accounting for any differences in the conditions prevailing in the different exporting countries.

70. Accordingly, the Appellate Body report in *US – Shrimp* does not support the notion that the Panel should compare China with all other Members interested in exporting poultry products to the United States to determine whether Section 727 violates the Article XX chapeau. Instead, the proper comparison is between China and other Members with equivalent food safety problems and whose poultry inspection systems have already been found equivalent or those Members for whom a determination was imminent. It is these Members who were similarly situated as China in that they had an expressed desire to export poultry to the United States, acted on that desire, and were in a position to be able to export in the near future.

71. When examining Section 727 under Article 2.3 of the SPS Agreement, it does not make sense to compare China with all countries who seek to export poultry to the United States either. As in the Article XX content, the Panel should only compare China with those WTO Members with equivalent food safety problems and who were already found equivalent or for whom an equivalence determination was imminent to determine whether China was discriminated against in the context of SPS Article 2.3. And because no Member who was in this position had the same food safety problems as China, Section 727 did not discriminate against China under Article 2.3 of the SPS Agreement.

Q129. United States: Please explain further why the United States believes that "identical or similar conditions" do not prevail in China and Mexico.

72. "Identical or similar conditions" do not prevail in China and Mexico for numerous reasons, both substantive and temporal.

73. From a substantive standpoint, China's food safety problems are much worse than Mexico's. Unlike China, Mexico never experienced a food safety crisis that the WHO characterized as "one of the largest food safety events the agency has had to deal with in recent years."[18] The United States is also not aware of widespread reports from well-respected international institutions or academics about food safety enforcement problems in Mexico.[19] Further, the problems FSIS uncovered during its audits of Mexico's beef and poultry facilities related to problems within individual facilities and confined to these facilities themselves. They did not raise the broad systemic problems raised by China's widespread problems of food safety enforcement.

74. Another difference between China and Mexico is Mexico's history of exporting products under FSIS's jurisdiction to the United States. Mexico had already been exporting meat to the

[18] Exhibit US-35.

[19] *See*, *e.g.*, Exhibit US-21; Exhibit US-22; Exhibit US-25.

United States for more than 20 years and had already been exporting processed poultry to the United States for more than nine years at the time that the problems with its inspection systems were identified.[20] Thus, FSIS had confidence that Mexico would work to resolve the problems it identified during the 2008 audit as it had done in the past when problems had arisen.

75. At the same time, similar conditions did not prevail in China as in Mexico because China and Mexico were at very different places in the equivalence process when concerns regarding their inspection systems arose. Unlike China, Mexico was not in the middle of an ongoing equivalence proceeding in which new rules had to be implemented and established to allow Mexico to export poultry to the United States when problems were uncovered. Thus, it would not have been expected for Congress to enact a funding restriction that related to an ongoing equivalence proceeding to deal with these problems. Further, because FSIS immediately acted to suspend Mexico's equivalence when problems were uncovered, a measure like Section 727 may not have been necessary at all.

D. ARTICLE 5.6

Q130. United States: In paragraph 53 of its second written submission, China mentions that under its normal regulations, FSIS has the possibility of temporarily suspending or permanently withdrawing a finding of equivalence. In light of this possibility, can the United States respond to China's argument that the normal FSIS procedures were a less-trade restrictive, technically and economically feasible alternative measure to achieve the US ALOP?

76. In the first instance, it is not appropriate to apply Article 5.6 to Section 727. The issue in an equivalence proceeding is whether China has demonstrated that its measures achieve the U.S. ALOP. The focus is on China's measures. For purposes of Article 5.6, the United States has adopted measures to achieve its ALOP – these govern U.S. poultry processing and slaughter establishments. China has different measures in place, and wishes the United States to accept those in place of the U.S. measures. So the issue in an equivalence proceeding is not the issue addressed by Article 5.6 – it is not the measures the United States has adopted to achieve its ALOP.

77. Putting this aside, it is important to note that the entire reason that Section 727 was enacted was to ensure a careful examination of whether China's measures achieved the US ALOP. While in normal circumstances, Congress considers that FSIS procedures are generally sufficient to ensure that an exporting country's measures achieve the U.S. ALOP, this was not the

[20] FSIS found Mexico's meat inspection system equivalent to the U.S. system in 1995 after the enactment of the Uruguay Round Agreements Act. Prior to 1995, Mexico exported meat products to the United States under FSIS's "equal to" regime, under which meat products had to be processed in other countries in accordance with U.S. law. Mexico had exported meat products to the United States under the "equal to" regime since 1988. FSIS found Mexico's processed poultry inspection system equivalent to the U.S. system in 1999.

case with regard to China due to the particular circumstances of the situation, including serious concerns about China's food safety enforcement issues, its numerous food safety crises, and the fact that FSIS had never before faced a similar situation.

78. To put it another way, China's suggested alternative is not feasible because it would directly undermine Section 727's objective. Section 727 was enacted to ensure that FSIS would fully consider the risks posed by Chinese poultry due to China's food safety problems before establishing or implementing equivalence rules. If instead of requiring this reassessment, the United States went ahead and implemented the equivalence rules, U.S. consumers would be exposed to the risks of potentially dangerous Chinese poultry before the concerns about safety were addressed. And placing consumers at risk in this manner is not consistent with ensuring that China's measures achieve the US ALOP.

79. FSIS's ability to temporarily suspend or permanently withdraw an equivalence finding does not support China's suggested alternative. As the United States noted in its response to Question 63 of the Panel's First Set of Questions, this approach would allow China to export potentially dangerous poultry to the United States before the United States is assured of the product's safety. This would put consumers at risk until "something goes wrong" and thereby directly undermine Section 727's objective of protecting human and animal life and health.

Q133. China/United States: Do Article 8 and Annex C of the SPS Agreement cover control, inspection and approval procedures undertaken as part of an equivalence determination process? In your answer please address the fact that Article 8 requires Members to "ensure that their procedures are not inconsistent with the provisions of this Agreement", which includes Article 4 on equivalency determinations.

80. As set out in the U.S. Second Written Submission,[21] the text of Article 8 and Annex C – including the text of Article 8, the title of Annex C, the associated footnote to Annex C, and the types of disciplines contained in Annex C – make clear that Annex C only applies to a limited set of procedures, and not to every matter addressed in the SPS Agreement.

81. The second part of the above question concerns the clause at the end of Article 8, which states : "and [Members shall] otherwise ensure that their [control, inspection, and approval] procedures are not inconsistent with the provisions of this Agreement." This clause simply clarifies that a control, inspection, and approval procedure that meets the Annex C requirements is not exempt from other relevant obligations contained in the SPS Agreement. The clause cannot be read as expanding the scope of control, inspection and approval procedures to include procedures involved in a determination of equivalence.

[21] U.S. Second Written Submission, paras. 119-125.

Q134. Do Article 8 and Annex C only cover control, inspection, and approval procedures related to a particular product?

82. Yes. Please see the U.S. response to Question 133 and paragraphs 119-125 of the U.S. Second Written Submission.

Q135. Do Article 8 and Annex C cover only approval decisions for individual importations of a particular product or do they also cover a general approval to import a particular product?

83. Article 8 and Annex C apply to approval decisions for particular products. The United States would emphasize that an equivalence determination under Article 4 is fundamentally different than a product approval. An approval procedure typically is examining a new substance to determine if it is safe for food or feed – for example, a food additive, pesticide residue, veterinary drug, antimicrobial treatment or fumigation treatment. The question in an equivalence procedure is the equivalence of measures adopted by an exporting member, not the safety of particular products.

Q136. United States: Does the United States agree with China's description of the FSIS procedures?

84. The United States would like to correct several errors and misleading statements in China's description of FSIS procedures in China's first and second written submissions.

85. *China's First Written Submission, paragraph 34*: China incorrectly states that "in the initial equivalence determination, the FSIS investigates whether the food safety measures of the exporting country are equivalent to the system employed in the United States." Rather, FSIS evaluates whether the food safety inspection system of the exporting country provides the same level of sanitary protection as the U.S. inspection system.

86. *China's First Written Submission, footnote 26*: Although China correctly recites the definition of "poultry product" under the PPIA, the United States notes that the CFR implements the PPIA's definition of "poultry product" to be "any poultry carcass, or part thereof, or any product which is made wholly or in part from any poultry carcass or part thereof, *capable of use as human food.*"[22] (Italics added)

87. *China's First Written Submission, paragraph* 35: China incorrectly states that APHIS uses the FSIS Automated Import Information System (AIIS). While FSIS has APHIS's animal disease restrictions programmed into its system, no enforcement actions are taken by FSIS. Animal health checks are made by U.S. Customs and Border Protection prior to releasing the shipment to FSIS based on APHIS instructions.

[22] *See* 9 C.F.R. 381.1(b)(41).

88. *China's First Written Submission, paragraph 37*: China is incorrect when it claims "[t]hese FSIS procedures are all based in 'rules' within the meaning of Section 727 and the Moratorium." The rule referred to in Section 727 is a rule that would allow poultry products to be exported to the United States from China. The meaning of the term "rule" within the context of Section 727 does not refer to FSIS's procedures for determining equivalence pursuant to the PPIA.

89. *China's First Written Submission, paragraph 39*: China's recitation of "five risk areas: sanitation control, animal disease control, slaughter and processing control, residue control and enforcement control" describes prior FSIS procedures. The United States notes that FSIS has revised its document review procedures to now evaluate six components, including government oversight, statutory authority and food safety regulations, sanitation, Hazard Analysis and Critical Control Point (HACCP) systems, chemical residues, and microbiological testing. The application process requires the foreign country to complete a self-assessment for initial equivalence, which assists with organizing the submission to expedite the evaluation.

90. *China's First Written Submission, paragraph 46*: China's statement that "[t]he recurring document analysis takes the same form as the initial document analysis . . ." is incorrect. While both document analyses aim to verify that the rules and regulations in the exporting country provide the requisite level of sanitary protection, the form of the analyses differ. For initial document analyses, the exporting country must complete and provide the Self-Assessment for Initial Equivalence for Meat, Poultry, and Egg products to FSIS. This information forms the basis for the eligibility of the country. For recurring document analyses, the exporting country must complete and provide FSIS with updated information in three sectors (Central Competent Authority (CCA) oversight, establishments, and laboratories) using the Self-Reporting Tool. Any updates to food safety legislation, inspection procedures, enforcement, or additional controls that are in place would be provided through the CCA module.

91. *China's First Written Submission, paragraph 47*: China's statement that "[f]inally, in contrast to an initial equivalence audit, during which FSIS inspectors conduct on-site visits to observe the implementation of the foreign food regulatory system, FSIS inspectors conducting a verification audit visit a sample of the certified export establishments in order to confirm the application of the regulations to the specific establishments that are certified to export to the United States" is incorrect. The purpose of equivalence verification audits "is to evaluate the foreign inspection program and verify equivalence, not to inspect individual foreign establishments" per se.

92. *China's Second Written Submission, paragraph 65*: China notes that FSIS has the right to reinspection at the border, implying that as a result, FSIS does not rely on the other country to enforce its own laws to ensure that the U.S. level of sanitary protection is maintained.[23] China's

[23] *See* China Second Written Submission, para. 65-66.

discussion of FSIS's re-inspections overstates the importance of reinspection among the steps FSIS takes to ensure that imported food is safe. It also fails to account for the role played by the exporting country when a deficiency is found during reinspection.

93. In general, FSIS's routine reinspection process does not involve a comprehensive evaluation of product safety. Rather, it simply monitors compliance with FSIS certification and labeling requirements. While FSIS does conduct a limited number of more thorough product examinations, these actions take place much less frequently than the normal type of reinspections to which China refers. Contrary to China's implications, FSIS does not employ reinspections as a primary means of ensuring import safety, and alone, reinspections are not sufficient to protect life and health.

94. Further, it is important to note that when FSIS finds a violation during this process, the violation is reported back to the exporting country, who is responsible to take the necessary corrective actions. This does not undermine, but rather reinforces the point that FSIS's equivalence regime relies on the exporting country's ability to adequately enforce its poultry inspection system as the primary means to ensure that the U.S. level of sanitary protection is being met.

95. *China's First and Second Written Submissions*: From a general standpoint, China's first and second written submissions both continually mis-characterize numerous steps under the PPIA as part of the rule making process, including the document review step and maintenance of equivalence, among others.[24] However, these are not rule making steps. By definition, only the publication of the proposed and final rules in the Federal Register announcing a country's eligibility to export product to the United States are appropriately considered "rule making" steps within the meaning of Section 727.

(a) China/United States: It is the Panel's understanding that once a country's food safety system regarding poultry products has been determined to be equivalent, a rule must be published in the Federal Register allowing the importation of poultry products from that country. Does this rule have to be re-published on a yearly basis?

96. No.

Q137. China/United States: Does an equivalence re-verification of a country's food safety system, provided its outcome is positive, result in a new rule being published in the Federal Register?

97. No.

[24] *See, e.g.*, China Second Written Submission, para. 30.

Q138. United States: It is our understanding that a Member may not export poultry products to the United States without a recognition of equivalence by the FSIS as established by the PPIA. If our understanding is correct, does the FSIS equivalence determination process have the same effect as an approval procedure?

98. No. The question in an approval procedure is whether a new particular substance, process or product, regardless of country of origin, should be approved for import or use. Once approved, it does not matter the source of the product and no further approval is needed for exports from another source. An equivalence determination is not addressed to the safety of specific products; rather, it is addressed to the safety measures adopted by an exporting country.

99. Thus, an importing Member might, for example, approve the existence of an additive (within certain limits) for poultry products. That approval would apply to all poultry products, regardless of whether the poultry was produced in the United States or any other location. In contrast, an equivalence determination is based on an examination of safety measures adopted by the exporting Member, and would only apply to products imported from that Member.

Q139. China/United States: Do Article 8 and Annex C of the SPS Agreement cover SPS measures per se, as well as procedures and information requirements to check and ensure the fulfilment of sanitary measures. Please explain your answer.

100. As explained in response to Question 133, and at length in paragraphs 119-125 of the U.S. Second Written Submission, Article 8 and Annex C do not apply to all SPS measures, but rather to control, inspection, and approval procedures.

(a) In paragraph 7.156, the panel in Australia - Salmon (Article 21.5 - Canada) made a distinction between "substantive sanitary measures in their own right" and procedures or information requirements to check and ensure the fulfilment of sanitary measures that are subject to paragraph 1(c) of Annex C. Do the parties agree with this distinction?

101. The *Australia - Salmon* discussion of Annex C involves what appeared to be a subsidiary claim, and the panel addresses the matter briefly (in only four paragraphs). That said, the United States notes that on its face, Annex C applies to procedures, and not to other types of SPS measures.

Q140. United States: Can a control, inspection, or approval procedure be an SPS measure?

102. Yes.

Q141. China/United States: Is Section 727 a "procedure" within the meaning of Article 8 and Annex C? In your answer please explain your understanding of the ordinary meaning of the term "procedure".

(a) Can a measure which stops the operation of certain procedures be itself considered a procedure within the meaning of Article 8 and Annex C?

103. As noted in response to Question 133 and paragraphs 119-125 of the U.S. Second Written Submission, the United States understands that Annex C only applies to control, inspection, and approval procedures, and does not to apply to the procedures involved in equivalence determinations.

Q142. China/ United States: Do the parties agree with the steps and issues considered by the panel in EC - Approval and Marketing of Biotech Products for its analysis under Annex C(1)(a) as explained in paras. 7.1494-1497 of that report?

104. Yes. However, the United States would emphasize that the *EC-Biotech* analysis of "undue delay" applied only to approval procedures, and not to procedures involved in an equivalence determination.

Q143. China/ United States: In case the Panel finds a violation of Annex C(1)(a), does it imply a violation to Article 8 of the SPS Agreement as well?

105. Yes.

Q146. China/ United States: Should the Panel consider the justifications listed by the United States under its affirmative defence under Article XX(b) for assessing whether an eventual "undue delay" caused by Section 727 was properly justified?

106. As a general matter, the rationale for why Section 727 was "necessary" would relate to whether any delay resulting from Section 727 was "due" or "undue." The United States would emphasize, however, that the "undue delay" obligation applies to control, inspection, and approval procedures, and not procedures in equivalence determinations, and that China has not explained how Section 727 has resulted in any delay of the equivalence process.

Q147. China/ United States: What exactly was prohibited under Section 727? Could the FSIS expend funds to proceed with other aspects of the FSIS procedures that did not include publishing the final rule in the Federal Register?

107. As the United States and China agree, the impact of a funding restriction is limited to its explicit terms.[25] Thus, for a temporary six and a half month period during fiscal year 2009, Section 727 prohibited the use of appropriated funds to conduct two very specific tasks. First, FSIS could not use funding to "establish" a rule related to slaughtered poultry from China. Second, FSIS could not use funding to "implement" a rule related to processed poultry from China.

108. Section 727's impact went no further than this and FSIS was permitted to conduct activities related to China's equivalence application, including activities listed in the PPIA. For example, while Section 727 was in effect, FSIS could and attempted to conduct the document review step of the PPIA. In addition, the JES accompanying Section 727 and FSIS's action plan indicate a desire to proceed with on-site audits of China's poultry inspection systems.

(a) For example, could the FSIS proceed with on-site audits and other procedures, during the period that Section 727 was in force? Would it be possible for the FSIS to complete its equivalence determination process on poultry products from China, during the period that Section 727 was in force?

109. As the United States has noted, activities related to the actual establishment or implementation of an equivalence rule could be completed during Section 727's period of applicability, including steps under the PPIA. Whether FSIS could have actually conducted any particular step is unfortunately a theoretical question because China never responded to FSIS's request for information about its food safety law, a step that was required to be taken before FSIS could proceed further.

110. The last step in FSIS's equivalence determination process is the publication of a rule in the Federal Register indicating that a particular country is equivalent to export poultry products to the United States. Because FSIS could not use appropriated funds to "establish" an equivalence rule for slaughtered poultry from China, this particular step could not be taken and the equivalence determination process could not be completed.

Q149. United States: The first sentence of Annex C(1) refers to "any" procedure while footnote 7 refers to control, inspection, and approval procedures. Does the United States believe Annex C covers "any" procedure or just control, inspection, and approval procedures?

111. As the United States has explained, the phrase "any procedure" in Annex C(1) must be read in context – which includes the title of Annex C, the footnote, and the text of Article 8 – to apply only to control, inspection, and approval procedures.

[25] *See* China Second Written Submission, para. 32.

VIII. CLAIM ON ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

Q150. United States: The Panel notes that the United States, in its second oral statement, characterized Section 727 as a "restriction" within the meaning of Article XI of the GATT 1994. Therefore, if the United States' defence under Article XX(b) is not sustained, would the United States concede that Section 727 is inconsistent with Article 4.2 of the Agreement on Agriculture? If not, why not?

112. As an initial matter, the United States has stated that China has the burden of showing that Section 727 is a restriction under Article XI, but that should the Panel find that China has met its burden, the United States will not contest the issue.

113. The United States generally supports an inclusive reading of Article 4.2 of the Agriculture Agreement. However, the United States submits that China's Article 4.2 claim in no way is important for resolving this dispute, and that the Panel should refrain – as a matter of judicial economy – from a finding on the scope of Article 4.2.

Q151. United States: Does the United States agree with China that a total import prohibition is a quantitative import restriction in its most extreme form and therefore is covered by footnote 1 to Article 4.2 of the Agreement on Agriculture?

114. Please see the U.S. response to Question 150.

Q152. China/United States: Could the parties please explain what types of measures they believe fall under "similar border measures" in footnote 1 to Article 4.2 of the Agreement on Agriculture?

115. In this context, "similar border measures" would mean measures similar to the types of measures listed in the first part of footnote 1, namely: quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, or voluntary export restraints.